United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1183. 142

JAMES L. PARSONS, APPELLANT,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, TO THE USE OF AUGUST B. DOUGLAS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 20, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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No. 1183.

JAMES L. PARSONS, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 3, 1902.

In the Court of Appeals of the District of Columbia.

JAMES L. PARSONS, Appellant,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, Use, &c. } No. 1183.

a Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, a Corporation, to the Use of August B. Douglas, Plaintiff,
vs.
JAMES L. PARSONS, Defendant. } No. 44318. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed November 26, 1900.

In the Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Co., a Corporation, to the Use of August B. Douglas, Plaintiff,
vs.
JAMES L. PARSONS, Defendant. } At Law. No. 44318.

1. The Plaintiff, The John Hancock Mutual Life Insurance Company, a corporation incorporated under the laws of the State of Massachusetts and doing business in the District of Columbia and elsewhere as a life insurance company, to the use of August B. Douglas, sues the defendant, James L. Parsons, for that on, to wit, the 9th day of May, 1899, the plaintiff, at the special instance and request of the said defendant, delivered to the said defendant, and the defendant accepted, a certain contract or policy of insurance in the said company upon the life of the said defendant, and in consideration thereof the said defendant undertook and then and there faithfully promised the said plaintiff to pay to it, the said plaintiff, the

sum of four hundred and twenty-three dollars and fifty cents ($423.50) for the first year's premium upon said contract or policy of insurance, which said premium was due and payable by the defendant to the plaintiff upon the acceptance by him of the said contract or policy of insurance delivered to him, as aforesaid, by the said plaintiff; yet the said defendant, not regarding his said promise and undertaking, did not and has not, although frequently requested so to do, paid to the said plaintiff, or to any one in its behalf, the said four hundred and twenty-three dollars and fifty cents
2 ($423.50) or any part thereof, but has wholly neglected and refused so to do, to the damage of the said plaintiff four hundred and twenty-three dollars and fifty cents ($423.50), with interest from May 9, 1899, and costs, and therefore he brings his suit.

2. The plaintiff, to the use of the said August B. Douglas, as aforesaid, also sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on account stated between them; and the plaintiff claims four hundred and twenty-three dollars and fifty cents ($423.50), with interest from the 9th day of May, 1899, according to the particulars of demand hereto annexed, which are made part of this declaration as if herein fully set forth.

CHAS. COWLES TUCKER,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the date of the service hereof; otherwise judgment.

CHAS. COWLES TUCKER,
Attorney for Plaintiff.

3 *Plaintiff's Particulars of Demand.*

WASHINGTON, D. C., *November* 23, 1900.

James L. Parsons to the John L. Hancock Mutual Life Insurance Company, a corporation, to the use of August B. Douglas, Dr.

To amount due from said Parsons for one year's premium on policy upon the life of said Parsons, No. 61627, in said company, issued by said company April 22, 1899, and delivered to and accepted by said Parsons on, to wit, May 9, 1899, said premium being payable in advance, $423.50, with interest from May 9, 1899.

4 *Affidavit.*

DISTRICT OF COLUMBIA, *To wit:*

August B. Douglas, being first duly sworn, deposes and says on oath as follows, to wit: That on April 22, 1899, the John Hancock Mutual Life Insurance Company, a corporation incorporated under the laws of the State of Massachusetts, with its principal place of business in the city of Boston and State of Massachusetts, issued the certain policy of insurance upon the life of James L. Parsons, mentioned and described in the aforegoing and annexed declaration and particulars of demand (which said declaration and particulars of demand are made a part of this affidavit as if herein fully set forth), and on May 9, 1899, affiant, who was the local or District agent of the said corporation, which is the same corporation that is named as plaintiff in said declaration and particulars of demand, delivered said policy of insurance to the said James L. Parsons, who is named as defendant in said declaration and particulars of demand, and he accepted the same; that prior to and upon the delivery and acceptance, as aforesaid, of said policy of insurance it was agreed by and between affiant and said Parsons that the first year's premium to be paid by said Parsons upon said policy of insurance to said insurance company should be the sum of four hundred and twenty-three dollars and fifty cents ($423.50), which said sum should be payable upon the delivery and acceptance of the said policy, as aforesaid; and upon and after the delivery and acceptance of said policy, as aforesaid, he, the said Parsons, promised and agreed to pay the said insurance company the said
5 sum of four hundred and twenty-three dollars and fifty cents ($423.50), which was payable by said Parsons upon the delivery of the said policy to him and his acceptance of the same, as aforesaid; that the said Parsons, although affiant, as agent of the said insurance company and also in his own behalf, has frequently requested the said Parsons to pay the said four hundred and twenty-three dollars and fifty cents ($423.50), has failed and refused and still continues to fail and refuse to pay the said sum or any part thereof to the said insurance company or to this affiant, although he, the said Parsons, has retained and still retains the said policy of insurance.

Affiant further avers that some time after the delivery of the said policy of insurance to the said Parsons and its acceptance, as aforesaid, affiant sent to the said insurance company the amount of the said first year's premium on said policy, namely, the sum of four hundred and twenty-three dollars and fifty cents ($423.50), less affiant's commission as agent for the placing of said insurance, and received from said company a receipt in full for said sum of money; that this action by affiant was taken by him in order to close his accounts with the said company and in the belief that the said Parsons would pay the said sum of money to this affiant; that subsequently the said company formally assigned, transferred, and made

over to this affiant all of its interest and claim in said sum of money due from said Parsons, as aforesaid.

And affiant claims there is due the said John Hancock Mutual Life Insurance Company, a body corporate, as aforesaid, to
6 the use of affiant, the sum of four hundred and twenty-three dollars and fifty cents ($423.50), with interest from May 9, 1899, exclusive of all set-offs and just grounds of defense.

AUGUST B. DOUGLAS.

Subscribed and sworn to before me this 26th day of November, A. D. 1900.

HARRY H. HALLAM,
Notary Public.

[SEAL.]

Defendant's Pleas and Affidavit.

Filed December 14, 1900.

In the Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, Use of August B. Douglass,
vs.
JAMES L. PARSONS.
} Law. No. 44318.

The defendant for plea says:

1. That he did not undertake and promise in manner and form as alleged.

2. And for a further plea the defendant says he never was indebted as alleged.

S. T. THOMAS,
Attorney for Defendant.

7 DISTRICT OF COLUMBIA, *ss:*

James L. Parsons, being first duly sworn, deposes and says he is the defendant in the above-entitled case; that he denies the right of the plaintiff to recover the whole or any part of its claim; that he never accepted the policy of life insurance mentioned in the plaintiff's declaration, nor was the said policy ever delivered to him; that while it is true affiant has possession of said policy, it is because the said Douglass, when affiant refused to receive it, placed it upon the mantel in the parlor of affiant's house and declined to take it away with him, and affiant's possession of said policy has, at all times, been within the control and subject to the authority of the said Douglass. Affiant further says that he never agreed to pay the plaintiff, The John Hancock Mutual Life Insurance Company, or its agent, August B. Douglass, the sum of $423.50, the alleged first year's premium on the aforesaid policy, nor did he ever request or direct the said Douglass to pay said company $423.50 for premium on the alleged insurance, nor did he ever agree or promise to pay the said Douglass the sum of $423.50 in consideration of his having paid the alleged premium on said policy.

And affiant further says that he does not owe the plaintiffs, or either of them, anything in respect of premium on the alleged policy of insurance, or upon any other account.

JAMES L. PARSONS.

Subscribed and sworn to before me this 13th day of December, A. D. 1900.

A. LEFTWICH SINCLAIR,
Notary Public, D. C.

[SEAL.]

8 *Joinder of Issue, &c.*

Filed December 20, 1900.

In the Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURance Company, Use of August B. Douglass, Plaintiff, *vs.* JAMES L. PARSONS, Defendant. } At Law. No. 44318.

The plaintiff joins issue upon the pleas of the defendant.

CHARLES COWLES TUCKER,
Attorney for Plaintiff.

Memorandum.

January 14, 1902.—Verdict for plaintiff for $423.50, with interest from May 9, 1899.

9 Supreme Court of the District of Columbia.

FRIDAY, *January* 24, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Claybaugh, justice, presiding.

* * * * * * * *

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, a Corporation, to the Use of August B. Douglas, Plaintiff, *v.* JAMES L. PARSONS, Defendant. } At Law. No. 44318.

Come again the parties hereto, by their respective attorneys, and the defendant's motion for a new trial, being considered, is ordered overruled, and judgment on verdict ordered; therefore it is considered and adjudged that the plaintiff herein recover of the defendant herein the sum of four hundred and twenty-three dollars and fifty cents ($423.50), with interest thereon from the 9th day of May, 1899, being the money as aforesaid found payable by said defendant to said plaintiff by reason of the premises, together with

its costs of suit, to be taxed by the clerk, and have execution thereof.

From the aforegoing judgment the defendant, by his attorney, in open court notes an appeal to the Court of Appeals of the District of Columbia, and prays that a bond to operate as a supersedeas be fixed. Thereupon it is ordered that a supersedeas bond, with surety or sureties to be approved by this court, in the sum of one thousand dollars be filed herein.

10 *Memorandum.*

February 5, 1902.—Appeal bond filed.

Supreme Court of the District of Columbia.

THURSDAY, *February* 6, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE JOHN HANCOCK MUTUAL LIFE INSURance Company, to the Use of A. B. Douglass, Plaintiff,
vs.
JAMES L. PARSONS, Defendant. } At Law. No. 44318.

Now, again comes here the defendant, by his attorney, and tenders to the court his bill of exceptions taken during the trial of this cause, and prays that it may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

11 *Bill of Exceptions.*

Filed February 6, 1902.

In the Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, a Corporation, to the Use of August B. Douglas,
vs.
JAMES L. PARSONS. } Law. No. 44318.

Be it remembered that at the trial of this cause on the 13th and 14th of January, 1902, before the Honorable Harry M. Clabaugh, justice, and a jury, the use plaintiff, to maintain and prove the issues on his part joined, called as a witness in his behalf GAIUS M. BRAUMBAUGH, who, being first duly sworn, gave evidence tending to prove that he was a practicing physician and one of the medical examiners of the plaintiff company; that on April 8th, 1899, at the request of the use plaintiff, witness made a medical examination of the defendant at the latter's home, No. 322 Tenth street S. E., Washington, D. C.,

with a view to his being insured in the plaintiff company; that at the conclusion of the examination of the defendant by witness the use plaintiff, who was present, requested the defendant to give him, the use plaintiff, a check for the first year's premium on the policy of insurance to be issued; that the defendant replied to wait until he got the policy, for he might not pass the medical examination; that the defendant also said that he would not get any money until he finished a certain marble building that he was at work upon,

12 and that witness remembers this because he continued the conversation relating to the marble because he, the witness, was interested in some marble. On cross-examination said witness also stated that he did not remember whether there was any conversation between the use plaintiff and the defendant at the time of said medical examination to the effect that the defendant need not take the policy of insurance when it was ready to be delivered to him if he did not choose to; that witness would not say that such a conversation did not take place, but that he had no recollection of any such conversation. The use plaintiff, to further maintain and prove the issues on his part joined, was sworn as a witness in his own behalf, and testified that he was the district agent of the plaintiff company in the District of Columbia on and prior to the first of April, 1899; that on or about the said last-mentioned date he solicited the defendant to take out a policy of insurance in the plaintiff company; that on the 8th of April, 1899, the defendant signed the application for a $10,000 policy in said company, which is attached to the stipulation between counsel for the respective parties and has heretofore been filed in this cause; that it was then understood between the defendant and the use plaintiff that the first year's premium on said policy, if the same should be issued, would be $423.50; that on the said last-mentioned date the defendant was examined by the preceding witness, Doctor Brumbaugh, and that the policy based on said application, and which was offered in evidence by the use plaintiff, and which is attached to this bill of exceptions, was, on April 26, 1899, written and afterwards sent to the witness and tendered by the witness to the defendant; that the de-

13 fendant objected to the clause in said policy which read "With the consent of the company," and the policy was thereupon returned to the company, the objectionable clause eliminated, and the endorsement made on the margin of said policy which is contained thereon and is signed by the secretary of said company; that thereupon the said policy was again tendered by the witness to the defendant and was accepted and received by him; that the witness asked the defendant for the first year's premium on said policy and the defendant said that he did not have the money then to pay it, but as soon as he could get some money for building the Hall of History of the American University he would pay said premium; that witness subsequently called upon the defendant a great number of times and demanded payment of said premium, but the defendant did not pay it, each time giving the excuse that he did not have the money and promising to pay it some time in

the future; at one time he promised to pay the money when he should have finished the Census Office building for which he was the contractor; that it was necessary for the witness, as District agent of said company, to make prompt and periodic returns of premiums collected on policies of insurance written through him or to return policies upon which premiums had not been paid, and on or about August 1, 1899, the witness, relying upon the promise of the defendant to pay the said premium on the policy received by him, remitted to the plaintiff company the amount of said premium, less 70%, which was the amount of his commission on said policy.

On cross-examination, the witness, in explanation of the fact that the revenue stamps on said policy were uncancelled, testified that it was customary not to cancel such stamps on policies until the premium was paid; that after witness had paid
14 said premium he went to the defendant's residence and asked for the policy for the purpose of cancelling the revenue stamps thereon; that the defendant said that the policy was at his office; that subsequently the use plaintiff called at the defendant's office and was then told by the defendant that the policy was at his house; that the use plaintiff thereupon called again at the defendant's house and was then told by the defendant that the policy was upstairs and he was too tired to go and get it, and that the defendant was lying on the lounge downstairs at the time; that subsequently the use plaintiff called a number of times upon the defendant in order to cancel said stamps, but for one reason or another the defendant would never give him the policy in order that the stamps might be cancelled; that the defendant did not request the witness to pay the premium to the plaintiff company, and had no knowledge that he had done so until after such payment was made; that on October 30, 1900, the assignment from said company to the witness of all of the former's interest in said premium was executed and delivered to the witness and is attached to the stipulation between counsel, which is in evidence in this cause.

Thereupon, the execution of the said obligation, the said assignment, and the said policy being admitted, the same were offered in evidence for the plaintiff, and the plaintiff there rested.

And the defendant, to maintain the issues on his part joined, was sworn as a witness in his own behalf, and testified that when the use plaintiff solicited him to insure in said company the use plaintiff said to the witness that he had a new form of policy that he wanted
15 to show the witness; that the use plaintiff did not have a sample copy of said policy, and witness did not understand from the use plaintiff's explanation what the provisions of the new form of policy were, and signed said application with the understanding and agreement with the use plaintiff that he, the witness, need not take the policy if he was not perfectly satisfied with it after he had examined it; that when said policy was issued and shown to the witness he read a little of it and objected to the form of the

beneficiary clause; that the use plaintiff then informed the witness that he did not think the plaintiff company would change the policy, but that he would send it back and see if the company would do so, and the use plaintiff thereupon took the policy away with him; that subsequently, after said clause had been eliminated by the plaintiff company, the use plaintiff again brought the said policy to the witness. The witness then further examined said policy, and, not being satisfied with the provisions therein contained, declined to accept it; that the use plaintiff thereupon placed the said policy on the mantle in the parlor of witness's house and refused to take it away with him, although requested by the witness to do so, and then left the house; that witness did not consider that the policy was in force, the revenue stamps not being cancelled, and *that* the witness never having accepted the same; that said policy was left with the witness against his consent, and that he was ready and willing at all times to give the same to the use plaintiff; that the witness at the time of the medical examination made by Doctor Brumbaugh told the Doctor that the agreement between the
16 witness and the use plaintiff was that witness would not be required to accept the policy when issued if he was not entirely satisfied with the same; that the witness never accepted said policy, never promised to pay the premium thereon, and never requested the use plaintiff to pay said premium.

On cross-examination the said witness testified that he did not return said policy, but had the same in his possession up to the time of the trial; that he kept the same in his safe, in his house; that he did not offer to return said policy to the use plaintiff because the latter had left the said policy with him against his consent; that the defendant could not say why he did not mail the policy to the use plaintiff or to the company, unless it was because he was neglectful in not doing so; that witness was ready and willing at all times to surrender said policy to the use plaintiff.

Upon further cross-examination the witness testified that he could not say what there was in the policy to which he objected, nor could he say wherein it differed from the policy which he wanted and for which he made the application and which the use plaintiff had explained to him; that when he, the witness, made the application he understood the amount of the premium he was to pay on the policy to be issued to him; he understood what the amount of the policy was to be. He wanted his wife to be the beneficiary in said policy, and he knew that upon his death the insurance of $10,000 was to be paid in installments of $500 each to his wife or his estate for 20 years; that while the policy issued upon his application was in conformity to his wishes in all these respects, he did not
17 care about it when it was tendered to him by the use plaintiff; that he simply did not want it.

And the defendant, to further maintain the issues on his part joined, called as a witness in his behalf CHARLES PARSONS, his son, who, being first duly sworn, testified that he was present at the time the de-

fendant was examined by Doctor Brumbaugh and heard the defendant say, in the presence of the use plaintiff and Doctor Brumbaugh, that the understanding and agreement was that he would not be required to take the said insurance unless the policy was satisfactory to him.

And thereupon the use plaintiff testified in rebuttal that at no time did the defendant refuse to accept the said policy of insurance, but, on the contrary, accepted it when he, the use plaintiff, tendered it to him and retained it in his possession, and that the defendant promised repeatedly to pay the premium, and never told the use plaintiff that the latter could have the policy at any time if he wanted it.

Thereupon, the evidence on both sides being closed, counsel for the plaintiffs announced that he had no instructions to ask, and counsel for the defense thereupon requested the court to instruct the jury on the whole evidence to return a verdict for the defendant, but the court refused said request; to which action of the court counsel excepted and requested the court to note said exception on its minutes, which was done.

And thereupon counsel for the defendant, without waiving said exception, requested the court to instruct the jury as follows:

18 1. If the jury believe from the evidence that the defendant refused to accept the policy of insurance mentioned in the declaration, and that August B. Douglas, agent of the plaintiff company, left the same at defendant's house and refused to take it away with him, and that said policy has at all times been within the control and subject to the authority of the said Douglas, then the plaintiff is not entitled to recover, and their verdict should be for the defendant.

(Rejected.)

2. If the jury believe from the evidence that the defendant never promised or agreed to pay the plaintiff, The John Hancock Mutual Life Insurance Company, or its agent, the said August B. Douglass, the sum of $423.50, the alleged first year's premium on the policy of insurance mentioned in the declaration, then the plaintiff is not entitled to recover, and their verdict should be for the defendant.

(Rejected.)

3. If the jury believe from the evidence that the defendant did not request or direct the use plaintiff, August B. Douglas, to pay the plaintiff, The John Hancock Mutual Life Insurance Company, the sum of $423.50, the alleged first year's premium on the policy of insurance mentioned in the declaration, or promise or agree to pay the said August B. Douglass said sum of $423.50 in consideration of his having paid the amount to said company, if he did so pay it, then the plaintiff is not entitled to recover, and their verdict should be for the defendant.

(Rejected.)

19 4. The jury are instructed that the law does not allow one person to intrude himself upon another as his surety, and if they believe from the evidence that the use plaintiff, August B. Douglass, voluntarily paid to the John Hancock Mutual Life Insurance Company the sum of $423.50, the amount of the premium

on the policy of insurance mentioned in the evidence, without any request from the defendant so to do, then the plaintiff is not entitled to recover, and their verdict should be for the defendant.

(Rejected.)

To the action of the court in refusing to grant said several prayers and allow the same to be read to the jury counsel for the defendant severally and respectively excepted and requested the court to note said exceptions on its minutes and to sign this the defendant's bill of exceptions, which is done, now for then, this 6th day of February, 1902.

[SEAL.] HARRY M. CLABAUGH, *Justice.*

Settled by consent.

CHAS. COWLES TUCKER,
Attorney for Plaintiff.

S. T. THOMAS,
Attorney for Defendant.

Thereupon the court, of its own motion, charged the jury as follows:

The COURT: Now, gentlemen, the case which you are to decide is one briefly of the following facts: The plaintiff in this case,
20 the insurance company, has, under the evidence, if you believe that is the evidence, assigned whatever claim it has against this defendant to the plaintiff Douglass, August B. Douglass, so that the case is brought in the name of the insurance company for the use of August B. Douglass. I mention this so that you will understand exactly what the form of the case is.

Now, gentlemen, the facts are for you, as you have already been told. The plaintiff is suing the defendant for the recovery of this premium on this insurance. Before there can be any premium on this insurance policy it must first be established that there was an insurance policy issued. The burden is cast upon the plaintiff to show by the preponderance of evidence, which you understand means the weight of the evidence, that the defendant in this case took out a policy of insurance in the plaintiff company, and that thereupon the company issued a policy of insurance to the defendant and delivered the same to him, for which the premium to the amount mentioned in the evidence was to be paid.

Now, those are the facts that you must find, and the burden is upon the plaintiff to show those facts by the preponderance of evidence, which, as I have stated, is the weight of evidence. So, therefore, if in this case you find that the defendant agreed to take the policy of insurance as described in the evidence in this case from the plaintiff company, and that the plaintiff issued a policy of insurance upon the life of the defendant, and that the same was given to the defendant and accepted by him in conformity with its contract, if you find such a contract, and that he promised thereupon to pay the premium on the policy, and that the plaintiff, Mr.
21 Douglass, advanced the money to the insurance company on account of the said premium, and that the policy was issued

and delivered as I have stated and accepted by the defendant, then this plaintiff is entitled to recover in this action. If, on the other hand, you find that the condition of the acceptance of this policy when it was ordered was that the defendant would take the policy provided the policy was acceptable to him when it was delivered, and that when the plaintiff did deliver the policy—that is to say, handed it to him—he objected to it, said he would not have it, and refused to pay the premium on the policy and always has refused to pay the premium; if you find that he is not to be bound by it except upon condition that it was satisfactory to him, then under those circumstances you would find for the defendant.

Now, it seems to me that this is the whole case narrowed down, and you will elect some one to act as your foreman.

Mr. TUCKER: There was only one expression in your charge, your honor, that might possibly be misleading to the jury, and that is, you said if they believed that the policy was delivered to the defendant and he then promised to pay for it at the time; it is not necessary to show a definite promise.

The COURT: I meant to so charge you. I had the plaintiff's testimony in mind when I made use of this word. If he ordered a policy and the policy was delivered to him in accordance with the contract, it does not make any difference whether he promised to pay the premium or not, he was liable on the premium, of course,
and that was what I had meant to instruct the jury. But
22 if, on the other hand, it was ordered with the understanding
that the defendant be satisfied, under such condition he would not be liable.

HARRY M. CLABAUGH, *Justice.* [SEAL.]

23 UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 22, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 44318, at law, wherein The John Hancock Mutual Life Insurance Company, a corporation, to the use of August B. Douglas, is plaintiff, and James L. Parsons is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 11th day of February, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1183. James L. Parsons, appellant, *vs.* The John Hancock Mutual Life Insurance Company, a corporation, use, &c. Court of Appeals, District of Columbia. Filed Feb. 20, 1902. Robert Willett, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1902.

No. 1183.

JAMES L. PARSONS, APPELLANT,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, TO THE USE OF AUGUST B. DOUGLAS.

FILED MARCH 20, 1902.

Court of Appeals, District of Columbia, April Term, 1902.

JAMES L. PARSONS
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, to the Use of August B. Douglas. } No. 1183.

Appeal from the supreme court of the District of Columbia.

It is hereby stipulated that the annexed copies of stipulation, assignment, policy of insurance, and application mentioned in the bill of exceptions in this case, but which were not included in the transcript, may be printed by the clerk of the Court of Appeals as part of the transcript of record in this case.

S. T. THOMAS,
Att'y for Appellant.
CHAS. COWLES TUCKER,
Att'y for Appellee.

In the Supreme Court of the District of Columbia.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, to the Use of August B. Douglas, Plaintiff, *vs.* JAMES L. PARSONS, Defendant.	At Law.	No. 44318.

Stipulation.

The defendant in the above-entitled cause, by his attorney of record, hereby waives the production by the plaintiff of the defendant's original application for a policy of insurance in the plaintiff company April 8, 1899, admits the execution of said original application, and consents that the annexed copy of said original application shall be used in the trial of said cause in lieu of said original; but the defendant reserves any and all rights of objection he may have to the materiality and relevancy of said original application.

The said defendant also admits the execution of the annexed assignment from the John Hancock Mutual Life Insurance Company of Boston, Massachusetts, to August B. Douglas, dated October 30, 1900, and consents that the same may be admitted in evidence, if otherwise competent, on the trial of said cause without proof of the execution thereof, reserving to himself all rights of objection as to the competency, materiality, and relevancy of said instrument.

S. T. THOMAS,
Att'y for said Defendant.

February 25, 1901.

(Copy.)

BOSTON, MASS., *Oct.* 30*th*, 1900.

For value received the John Hancock Mutual Life Insurance Company of Boston, Mass., a corporation, has assigned, transferred, and made over, and does hereby assign, transfer, and make over, unto August B. Douglas, of Washington, D. C., his executors, administrators, and assigns, all its right, title, and interest, claim, and demand in and to one year's premium on policy No. 61627, due said company from James L. Parsons; which said premium amounts to four hundred and twenty-three dollars and fifty cents (423.50), with interest from April 22, 1899.

In testimony whereof the said corporation has caused its name to be hereunto attached, by its president, and its corporate seal hereunto affixed.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
[SEAL.] By S. H. RHODES, *Pres't.*

Attest: (ROLAND O. LAMB.)

[Endorsed:] No. 44318. Law. John Hancock Mutual Life Insurance Company, to use of August B. Douglas, *vs.* James L. Parsons. Stipulation admitting certain documents in evidence.

UNITED STATES OF AMERICA.

Trust Fund Coupon Policy.

Number 61,627. Amount, $10,000. Age, 52.

The John Hancock Mutual Life Insurance Company of Boston, Mass., in consideration of the premium of four hundred and twenty-three and $\frac{50}{100}$ dollars, to be paid on or before the twenty-second day of April in every year, until the premiums for twenty full years shall have been paid, or until the death of the insured, does insure the life of James L. Parsons, of Washington, District of Columbia in the amount of ten thousand dollars and promises to pay at its office in Boston, the said amount to his wife, Mary L. Parsons, in the manner provided in the coupons hereto annexed, subject to the following conditions:

It is agreed that should my beneficiary die before this contract becomes a claim, the insured may, with the consent of the company, nominate a new beneficiary. If no such nomination be made however, his legal representatives shall have the option at his death of commuting the then present value of instalments to become due hereunder into a cash payment according to the table hereon; and a like option of commutation shall extend to the legal representatives of the beneficiary should said beneficiary die after the insured and before receiving all the instalments provided in said coupons.

Neither this policy nor the coupons attached hereto are assignable.

This policy shall not take effect until delivered and the first premium hereon paid during the lifetime and good health of the insured.

If any of the statements made in the application for this policy, which application is hereby referred to and made part hereof, are in any respect untrue; or if any of said premiums shall not be paid when due, this policy shall be void, except as hereinafter agreed.

The risk, occasioned by military or naval service in time of war, is one not assumed by this contract, and should the insured engage in such service, this policy (except for the amount of the legal net reserve) shall become void, unless permission for such service shall have been obtained from the company over the signature of the president or secretary.

Self-destruction, sane or insane, within two years from the date hereof, is not a risk assumed by this company, but in such case it will pay the amount of the legal net reserve under this policy.

This policy shall be incontestable after two years from its date, except for non-payment of premium or military or naval service in time of war.

If the third, or any subsequent annual premium, or instalment thereon, shall not be paid when due, this policy shall not become void, but the company will——

(Table of surrender values omitted.)

No suit shall be brought against the company on any claim under this policy, unless commenced within two years from the time when the right of action accrues.

No person, except the president or secretary is authorized to make, alter or discharge contracts, or waive forfeitures.

This contract is made and is to be performed in the Commonwealth of Massachusetts.

In witness whereof the John Hancock Mutual Life Insurance Company has by its president and secretary executed and delivered this contract, at Boston, on this twenty-second day of April, A. D., 1899.

S. H. RHODES, *Pres't.*

WALTON CROCKER,
Ass't Secretary.

(Twenty coupons of five hundred dollars each omitted.)

NOTE.—In the second paragraph of the above policy the words "with the consent of the company" were erased and the following note made in ink on the margin of the policy: "The words 'with the consent of the company' erased by Roland O. Lamb, secretary."

Application on the Back of Above Policy.

Application is hereby made to the John Hancock Mutual Life Insurance Company, of Boston, Mass., for a trust fund coupon policy, on the 20-payment life plan (endowments will be made payable to the insured at maturity unless otherwise requested) to the amount of $10,000 to be paid in twenty annual instalments for the benefit of (enter relationship and full name) Mary L. Parsons, my wife. I wish to pay the premium annually, and to have the surplus credited annually.

I was born on the 19th day of March, 1847, and shall be 53 years of age next birthday. The only insurance on my life is as follows:

Name of company.	Amount of insurance.	Plan.	When issued.
New England Mutual	2,000	Ordinary life.	December, 1893.
New York Life.....	2,000	Ordinary life.	December, 1893.

Had 10,000 ordinary life, continuous installment issued by New York Life. January 10, 1898, returned for cancellation.

I have never made an application to insure my life to any com-

pany nor agent upon which a policy has not been issued, nor is there one now pending, unless so stated above. My occupation is contractor and builder.

Dated at Washington, D. C., April 8, 1899.

JAMES L. PARSONS, *Applicant.*

P. O. address: 322 10th street S. E.

[Endorsed:] No. 1183. James L. Parsons, appellant, *vs.* The John Hancock Mutual Life Ins. Co., to use of August B. Douglas. Addition to record, per stipulation of counsel. Court of Appeals, District of Columbia. Filed Mar. 20, 1902. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1902.

No. 1183.

JAMES L. PARSONS, APPELLANT,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, TO THE USE OF AUGUST B. DOUGLAS.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

SIDNEY T. THOMAS,
Attorney for Appellant.

LAW REPORTER PRINT, WASHINGTON, D. C.

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Court of Appeals of the District of Columbia

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THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, TO THE USE OF AUGUST B. DOUGLAS.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

This was an action to recover $423.50, the first year's premium on a policy of insurance for $10,000 on the life of the appellant. The declaration contained two counts; one alleging acceptance of the policy, and a promise to pay the premium, and one for money paid for the use of the defendant. Defense: That the appellant never accepted the insurance, nor requested the use plaintiff to pay the premium.

It appears from the bill of exceptions that Douglass, the general agent of the John Hancock Mutual Life Insurance Company, in the District of Columbia, requested Parsons to insure his life in said company, saying he had a new form of policy, and on April 8, 1899, procured him to sign an application for $10,000 of insurance in said company, on the twenty-year endowment plan, payable to his wife, Mary

L. Parsons, with the understanding and agreement, that he need not accept the insurance, if, after examining the policy he did not like it. After examining the policy Parsons refused to accept it, and requested Douglas to take it away with him, which he refused to do, leaving it at Parsons' house, without canceling the revenue stamps thereon; subsequently Douglas called at Parsons' house and asked for the policy to cancel the revenue stamps, but Parsons refused to let him have it for that purpose, but told him he could have it if he would take it with him. Parsons also testified that he never considered the policy—which contained the condition that it should not take effect until the first premium was paid—in force, and was ready and willing at all times to have returned it to Douglas.

On the other hand Douglas testified that Parsons accepted the policy, and promised to pay the premium; but that he never did, and that he, Douglas, paid it, less 70 per cent, the amount of his commission, without the request of Parsons; that once after the premium was paid he called at Parsons' house and asked for the policy for the purpose of canceling the stamps thereon, and that Parsons refused to let him have it.

The case was tried to a jury on the pleas of non-assumpsit and *nil debet*, and resulted in a verdict for the plaintiff.

The defendant filed a motion for a new trial which being overruled he took the present appeal.

ASSIGNMENT OF ERRORS.

The court below erred:

1. In refusing to grant the defendant's motion to instruct the jury to return a verdict for the defendant.

2. In refusing to grant defendant's prayers 1, 2, 3,nd 4 a (Rec., p. 10).

POINTS AND AUTHORITIES.

The Policy in Question was Never Delivered.

In view of section 9 of the Revenue Act approved June 13, 1898, which makes it the duty of the person using revenue stamps to "write thereon the initials of his name and the date upon which the same shall be attached," and section 7 of said act which declares that any document "not duly stamped shall not be competent evidence in any court," it is very doubtful whether the policy of insurance in question ever became operative. The stamps on the policy were not canceled and the use plaintiff Douglas, tesfied in explanation, "that it was not customary to cancel stamps or policies until the premiums were paid."

Prepayment of First Premium Essential to Binding Contract of Insurance.

Aside from the point that the policy in question never became operative because the revenue stamps thereon were not canceled, is the question whether when the use plaintiff volunteered to pay the premium there was any binding contract of insurance, in view of the stipulation that "this policy shall not take effect until delivered and the first premium paid."

It is well to settle that where a policy of life insurance contains this stipulation, the payment of the first premium by a third person, without the knowledge of the applicant, although with his money, is of no effect.

Joyce on Ins., Sec. 75.

Thus in Whiting *vs.* Mass. Mut. Life Ins. Co., 129 Mass. 240, the facts were: That in February, Fairfield, the plaintiff's intestate, applied for insurance in the defendant company; and early in May following the policy in suit was left at his place of business by an agent of the company who, by letter, requested payment of the premium "if

the policy was correct and satisfactory." This request was repeated on May 21 by letter addressed to Fairfield, who was then at home, having arrived there in ill health on the 18th of the same month. He died of this illness on May 27. The letter of the 21st was opened by his sister, who, without communication or direction from him, caused the advance premium to be paid to the company by a check signed by a member of the firm in which Fairfield was a partner. Fairfield died without knowledge of this payment. On these facts it was held that no contract of insurance existed.

Colt, justice, delivering the opinion of the court, said in part:

> "Upon this state of facts it is plain that no contract of insurance existed between the parties at the time of the death of the plaintiff's intestate. The possession of the policy, without a waiver, on the part of the company, of the condition on the performance of of which it was to take effect, does not on the facts disclosed show a delivery of it in completion of the contract, or furnish any evidence that the minds of the parties had met. It is not enough that the form of the policy had been approved, for it was still optional with Fairfield whether he would by payment make it a binding contract. If he declined or neglected to pay, the company would have no claim for the premium against him, or against his estate, because the risk never attached. A payment by a stranger, made without the knowledge or consent of the assured, though made with his money, would not bind him or the company; and the money so wrongfully appropriated, could be recovered back by him or by his administrator."

See to the same effect—

Giddings *vs.* Life Ins. Co., 102 U. S. 108.

Payment Extinguished the Obligation.

But assuming the policy in question had been delivered and became operative as a contract of insurance, the pay-

ment of the premium by the use plaintiff operated to extinguish the obligation and prevent subrogation, there being no understanding or agreement at the time the premium was paid to keep the claim alive for his benefit. The case on the part of the appellee was tried on the theory of an express assignment (executed more than eighteen months after the policy was issued), and that the defendant requested the payment of the premium. But the trial judge held the use plaintiff entitled to subrogation, and allowed the case to go to the jury on the question whether the defendant accepted the policy.

The presumption is that the plaintiff company supposed the money received by it on account of the premium in this case came from Parsons. Hence the use plaintiff's payment extinguished the obligation.

Thus, where an agent who paid over to his principal out of his own funds the amount due upon a mortgage note intrusted to him, it was held there was no subrogation, because the principal supposed that the money came from the debtor, and that both the note and the mortgage were extinguished.

Sheldon on Subrogation, Sec. 6.
Brice *vs.* Watkins, 39 La. Ann. 21.

It will not do for the use plaintiff to rely on an assignment of the claim executed eighteen months after payment of the premium. There was nothing to assign. The claim had been extinguished.

Subrogation to the rights of a creditor is to be distinguished from an assignment of a debt, by the fact that the latter assumes the continued existence of the debt, while the former follows only upon its payment.

Sheldon on Subrogation, Sec. 6.
Ellsworth *vs.* Lockwood, 42 N. Y. 89.
Lamb *vs.* Montague, 112 Mass. 353.

No Waiver of Condition That Policy Should Not Take Effect Until Premium Was Paid.

There was no pretense that the condition that the policy in question should not take effect until the premium was paid was waived in any way. By the terms of the policy no one except the "President or Secretary" could do that. The use plaintiff himself, although the general agent of the company, had no authority to waive the payment of the premium and deliver the policy to Parsons.

Hutchings *vs.* Munger, 41 N. Y. 155.
Orimond *vs.* Ins. Co., 96 N. C. 158.

When it is considered that the use plaintiff's share of the premium was *seventy per cent.* it is easy to account for his persistent effort to insure the appellant's life, and also for the chances he took in volunteering to pay the company *thirty per cent* of said premium, without the appellant's request.

The Use Plaintiff Not Entitled to Subrogation.

The doctrine of subrogation requires (1) that the person seeking its benefit must have first paid a debt due to a third party; (2) that he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in case of sureties, prior mortgages, etc. The right is never accorded to one who is a volunteer in paying the debt of one person to another.

Ætna Life Ins. Co. *vs.* Town of Middleport, 124 U. S. 549.
Shinn *vs.* Budd, 14 N. J. Eq. 234.

No Agreement for Subrogation.

In the case at bar the use plaintiff in paying the alleged premium acted as a mere volunteer. He was not compelled

to pay. It is well settled that no one can be allowed to obtrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, and without any agreement to that effect with his debtor, he can not take the place of a creditor or recover the money so paid of the debtor, because the law does not permit one man to thus officiously and without solicitation, intermeddle with the affairs of another.

Sheldon on Subrogation, Sec. 241.
Winder *vs.* Diffenderfer, 2 Bland Ch. 199.

In Winder *vs.* Diffenderfer, *supra*, it was laid down as a general rule that no person shall be allowed to intrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he can not take the place of the creditor, or *recover of the debtor the money so paid.*

> "The only exception to this rule is where on a bill of exchange being dishonored, a third person, not a party to it, pays it for the honor of the drawer, or any of the indorsers."
>
> Bland, Chancellor, citing Chitty on Bills, 164.

There was no pretense at the trial of this case that the appellant requested the use plaintiff Douglas to pay the premium. It was necessary for him to prove such request as a condition to his right to recover.

2 Greenl. Ev., Secs. 107, 13, 14.
1 Chit. Plead. 361–496.

It has been held in New York, where an insurance agent had written and delivered policies of fire insurance, and afterwards the insured sought to repudiate liability for the premiums, and before the trial the agent paid the premiums

without request from the insured, that it was a voluntary payment, which the agent could not recover from the insured.

Ross *vs.* Silvermann, 53 N. Y. S. 906.
Ross *vs.* Rubin, 54 N. Y. S. 1036.

Gildersleeve, Justice, speaking for the court, in the case last above cited, said:

> "There is no evidence that the defendant ever requested the plaintiff to make this payment, and the presumption is, that no such request was made, inasmuch as the payment was not made until after the commencement of the action. The plaintiff was apparently the agent of the company, and the policy of insurance was a contract between the plaintiff's principal and the defendant. There does not appear to have been any employment by the defendant of the plaintiff; but this payment was apparently quite voluntary on his part. The evidence fails to disclose an obligation on his part to pay the money or any request from the defendant to pay the same."

Subrogation Based on Suretyship.

The right of subrogation is based on the fact that the person who pays the debt stands in the position of a *surety*, or is compelled to pay to protect his own interests, as where one is surety for another that he will account for moneys.

2 May on Insurance, Sec. 456.

A mere stranger or volunteer having no interested relationship to the parties who pay the debt of another, can not be subrogated to the creditor's rights.

Thus, where the general agent of an insurance company had appointed a local agent and taken from him a bond running to the company, conditioned that the local agent would pay over all moneys received by him, less his commission, and the general agent had paid the company cer-

tain premiums received by the local agent, but not accounted for by him, it was held that as the general agent was bound—

> "by his contract with the company to pay over all moneys received in the general management of the affairs of the company, and had paid before the suit the amount of the defalcation of Wallis (the local agent), who was bound to make monthly returns,"

the general agent's payment was subrogated to the rights of the company in respect to the premiums collected by the local agent.

Hough *vs.* Ætna Life Ins. Co., 57 Ill. 318.

The court below, on the authority of Gillett *vs.* Insurance Co. of North America, 39 Ill. App. 289, overruled the defendant's motion to direct a verdict, and allowed the case to go to to the jury. That case was not relevant and should not have been followed. The learned trial judge overlooked the fact that the decision in that case was based on the terms of a *special agreement* between the company and their agents, that—

> "if the latter shall advance premiums which the insured fail to pay, the agents will be subrogated to such rights as the insurers had by the terms of the insurance contract to receive the premiums."

Joyce on Insurance, Sec. 3580.

Use Plaintiff a Volunteer.

But to conclude, the use plaintiff in this case was a mere volunteer; there was no agreement between him and the insurance company, as in the Illinois cases, above referred to, that if he advanced premiums which the insured failed to pay he should be subrogated to such rights as the company had to collect such premiums. His own testimony shows that he was not compelled to pay the premium the

appellant had refused to pay. He says (Rec., top p. 8) that it was necessary for him either to account to the company for the premium or *return the policy.* He was therefore not compelled to pay the premium to protect his own interest in any sense that entitled him to subrogation. The policy had never become binding. The use plaintiff could have returned it and retained his position as agent of the company.

It is respectfully submitted that the court below erred in submitting the case to the jury, and that the judgment appealed from should be reversed.

SIDNEY T. THOMAS,

Attorney for Appellant.